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Federal Communications Commission

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	MM DOCKET NO. 96-223
	)	
QUALITY BROADCASTING, INC.	)	File No. BR-951130C7
	)	
For Renewal of License	)	
for Station WNEX(AM)	)	
Macon, Georgia	)	

#### Appearances

*Kevin R. Armbruster, Esquire*, on behalf of Quality Broadcasting, Inc., and *James W. Shook, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

#### SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG

Issued: February 20, 1997

Released: February 24, 1997

#### Preliminary Statement

1. By *Hearing Designation Order*, 11 FCC Rcd 14504, released November 7, 1996 ("*HDO*"), the Assistant Chief, Audio Services Division, Mass Media Bureau, by delegated authority, designated for hearing the application of Quality Broadcasting, Inc. ("Quality"), for renewal of license for Station WNEX(AM), Macon, Georgia. The following issues were specified:

- (1) To determine whether Quality Broadcasting, Inc. has the capability and intent to expeditiously resume the broadcast operations of WNEX(AM), consistent with the Commission's Rules.
- (2) To determine whether Quality Broadcasting, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
- (3) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal of license application would serve the public interest, convenience and necessity.

The *HDO* further provided that, in the event it is determined that a grant of the renewal application would serve the public interest, convenience and necessity, the grant will be conditioned on the expeditious resumption of operation. *HDO* at para. 6. The *HDO* placed upon Quality both the burden of proceeding with the introduction of evidence and the burden of proof.

*Id.* at para. 8. A prehearing conference scheduled to be held on December 11, 1996, was cancelled at the request of the parties. *Order*, FCC 96M-264, released December 6, 1996.

2. Presently under consideration are a Motion by Quality Broadcasting, Inc. for Summary Decision, filed on February 4, 1997, by Quality; the Affidavit of J. Thomas McAfee, III, filed on February 13, 1997, by Quality; and Comments in Support of Motion by Quality Broadcasting, Inc. for Summary Decision, filed on February 18, 1997, by the Mass Media Bureau.

### Findings of Fact

3. The *HDO* recited the following facts as the basis for the specification of the issues in this proceeding:

The Commission's records indicate that WNEX(AM) suspended operations sometime between August 1994 and July 1995. On July 6 and August 16, 1995, the Commission sent inquiry letters and requested Quality to submit information concerning its compliance with Section 73.1740 (Minimum Operating Schedule) of the Commission's Rules. The letters, both of which were directed to Quality at its then last known address-of-record and also to other addresses listed on its ownership reports, were returned to the Commission by the U.S. Postal Service. However after numerous attempts, the staff located the attorney who is currently representing the licensee.

On June 19, 1996, Quality's attorney filed a request for special temporary authority to authorize WNEX(AM) to remain silent. He indicated that the studio was destroyed by a fire in August 1994, and since then, the station had been vandalized several times. He further indicated that Quality has diligently attempted to locate a buyer for the station, after a proposed assignee refused to consummate an assignment of license transaction . . . , which was granted on August 28, 1994. Additionally, he asserted that since all attempts to assign the license of WNEX(AM) had failed, Quality currently plans to assign the license of WNEX(AM) to the licensee's son. The attorney also represented to the staff that he would file a status report to the Commission regarding a timetable as to when an assignment of license application would be filed.

On September 16, 1996, Quality's attorney filed a letter indicating that Quality would file an application for approval of the sale of WNEX by September 30, 1996. However, our records reveal that an application for the assignment or transfer of control of the station's license has not been filed, to date. Thus, WNEX(AM) has been off the air at least for over one year, is not presently authorized to remain silent, and has not demonstrated that it either diligently attempted to resolve the station's problems or that causes beyond its control prevent the expeditious resumption of operations. . . .

*HDO* at paras. 2-4.

4. In its Motion for Summary Decision, Quality does not dispute that portion of the *HDO* which summarizes the facts leading to the designation of this proceeding for hearing. Rather, Quality states that it resumed operations on Station WNEX(AM) on November 22, 1996, and that it will remain on the air for the foreseeable future. In addition, Quality notified the Commission of the resumption of station operations by letters dated December 12, 1996, and January 15, 1997. Further, Quality reports that on December 13, 1996, an application to assign the license of the station from Quality to TM Communications, Inc. ("TMC"), was filed (File No. BAL-961213GJ). Quality relates its understanding, resulting from a conversation with a Commission employee, that the assignment application has been processed and published, that everything is in order, and that no objection was lodged against the assignment application. The Motion for Summary Decision is supported by the affidavit of J. Thomas McAfee, III, who is the station manager of WNEX(AM) as well as the owner of TMC.

#### Conclusions of Law

5. The Motion for Summary Decision will be granted and the issues will be resolved in Quality's favor. Pursuant to Section 1.251 of the Commission's Rules, in order to warrant summary decision a party must show that there is no genuine issue of material fact remaining for determination at the hearing. In order to sustain such a motion, it must be established that the truth is clear, that the basic facts are undisputed, and that the parties are not in disagreement regarding the material factual inferences that may be properly drawn from such facts. *Big Country Radio, Inc.*, 50 FCC 2d 967 (Rev. Bd. 1975). Quality has met this stringent test.

6. With respect to Issue 1, the findings establish, and it is concluded, that Quality does have the capability and intent expeditiously to resume the broadcast operations of the Station. Suffice it to say, in light of the fact that Station WNEX(AM) resumed broadcast operations on November 22, 1996, that Quality has operated the station for three months, and that an assignment application has been filed, the capability and intent of Quality are beyond question. Under these circumstances, Issue 1 is resolved in favor of Quality. *Keyboard Broadcasting Communication*, 10 FCC Rcd 4489 (MMB 1995).

7. Turning to Issue 2, it must be concluded that, although Quality did not violate Section 73.1750 of the Commission's Rules, it was in violation of Section 73.1740(a)(4) of the Rules for almost two years. Such violation, however, does not reflect adversely upon the basic qualifications of Quality to remain a Commission licensee.

8. Section 73.1750 of the Commission's Rules provides:

The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall

forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

Quality did not violate this section of the Rules. Thus, Quality's return of the station to broadcast operations and its submission of an assignment application clearly indicate that Quality never intended to discontinue operation of WNEX(AM) permanently. Further, the filing by Quality of an application for renewal of license (File No. BR-951130C7), as opposed to surrendering the license for cancellation, is also indicative of Quality's intent to resume operations as soon as a buyer could be found.

9. Section 73.1740(a)(4) of the Commission's Rules provides, in pertinent part:

In the event that causes beyond the control of a licensee make it impossible . . . to continue operating, the station may . . . discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of . . . discontinued operation. . . . In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

The findings establish that Quality was in violation of this provision of the Rules from August 1994, when its studio was destroyed by fire, to June 19, 1996, when it filed a request for special temporary authority to remain silent. During that nearly two-year period, Quality failed to notify the Commission of its discontinued operation, and no written request for authority to remain silent was made. However, because Quality did, in fact, notify the Commission of its discontinued operation, albeit late, and did not conceal its silence from the Commission, it is concluded that this rule violation does not impact adversely upon Quality's basic qualifications. Cf. *Video Marketing Network, Inc.*, 10 FCC Rcd 7611, 7613 (MMB 1995); *Cavan Communications*, 10 FCC Rcd 2873 (ALJ 1995). Consequently, Issue 2 will be resolved in Quality's favor.

#### Ultimate Conclusion

10. In sum, it has been concluded that Quality has the capability and intent expeditiously to resume the broadcast operations of the Station consistent with the Commission's Rules, that Quality did not violate Section 73.1750 of the Commission's Rules, and that Quality did violate Section 73.1740(a)(4) of the Rules. It has been further concluded that Quality's rule violation is not disqualifying. It is, therefore, ultimately concluded that the public interest, convenience and necessity would served by a grant of Quality's renewal application. Cf. *Video Marketing Network, Inc.*, *supra*; *Keyboard Broadcasting Communication*, *supra*; *Cavan Communications*, *supra*.

Accordingly, IT IS ORDERED that the Motion by Quality Broadcasting, Inc. for Summary Decision, filed by Quality on February 4, 1997, IS GRANTED, and Issues 1, 2 and 3 ARE RESOLVED in favor of Quality.

IT IS FURTHER ORDERED that, unless an appeal from this Summary Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Sections 1.251(e) and 1.276 of the Rules, the above-captioned application of Quality Broadcasting, Inc., for renewal of license for Station WNEX(AM), Macon, Georgia, IS GRANTED.<sup>1</sup>

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg  
Administrative Law Judge

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<sup>1</sup> In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release pursuant to Sections 1.251(e) and 1.276(d) of the Rules.